

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

WSOU INVESTMENTS LLC           \*  
  \*           February 16, 2023  
VS.                                   \*  
  \*           CIVIL ACTION NOS.  
GOOGLE LLC                       \*   W-20-CV-572/580/584/585

BEFORE THE HONORABLE ALAN D ALBRIGHT  
MOTION and MARKMAN HEARING (via Zoom)

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09:32 1 (Hearing begins.)

09:32 2 DEPUTY CLERK: A civil action in Cases  
09:32 3 6:20-CV-572, 580, 584, and 585, WSOU Investments LLC  
09:32 4 versus Google LLC. Cases called for a Markman and  
09:32 5 motions hearing.

09:32 6 THE COURT: Announcement from counsel,  
09:32 7 please.

09:32 8 MR. ABRAHAM: Good morning, Your Honor.  
09:32 9 This is Joseph Abraham with Folio Law Group here on  
09:32 10 behalf of plaintiff Brazos Licensing and Development.

09:32 11 With me today arguing the summary  
09:32 12 judgment motion will be Ms. Alexandra Fellowes, whose  
09:32 13 acquaintance you made last week, I believe.

09:32 14 And then arguing the Markman term will be  
09:32 15 Mr. Moses Xie, who's making his first appearance in  
09:32 16 district court.

09:32 17 THE COURT: Well, that'll be fun for me  
09:32 18 at least, so I look forward to it.

09:32 19 Mr. Jones?

09:33 20 MR. JONES: Your Honor, this is Mike  
09:33 21 Jones for Google. Together on the phone for Google are  
09:33 22 Greg Lanier, Edwin Garcia, Shaun Hassett, Sasha  
09:33 23 Mayergoyz, Tracy Stitt, Erika Warren and Jenna Kash.  
09:33 24 And from Google itself, Mr. Charles Stiernberg.

09:33 25 And Mr. Lanier will be making our

09:33 1 arguments. And I think he's done it before on an  
09:33 2 occasion, I'm not sure.

09:33 3 We're ready to proceed, Your Honor.

09:33 4 THE COURT: I've gotten to enjoy  
09:33 5 Mr. Lanier arguing in front of me many times, and I  
09:33 6 talk about it frequently to anyone who will listen. So  
09:33 7 I look forward to hearing the motion.

09:33 8 I'll hear from Google.

09:33 9 MR. JONES: Thank you, Your Honor.

09:33 10 MR. LANIER: Thank you, Your Honor. Good  
09:33 11 morning. I apologize my new camera has cut out my  
09:33 12 guitar that's usually in the background. I only have  
09:33 13 one showing today, but sorry about that.

09:33 14 Thank you, Your Honor, and thank the  
09:33 15 Court's team for the preliminary constructions.

09:33 16 As Your Honor has probably heard, the  
09:33 17 parties had reduced the issues on which they would like  
09:34 18 to be heard this morning to two issues that arise in  
09:34 19 the 572 case, and that relate to the '806 patent.

09:34 20 The first is cross-motions for summary  
09:34 21 judgment relating to the issues of validity under 101  
09:34 22 and then one term, "IPTV."

09:34 23 And with the Court's permission, we'll  
09:34 24 turn first to our motion on the 101 issues.

09:34 25 THE COURT: That would -- yes, please.

09:34 1 MR. LANIER: Thank you, Your Honor. My  
09:34 2 colleague Mr. Garcia is going to share his screen and  
09:34 3 pop the slides up.

09:34 4 And, Mr. Garcia, if you could just jump  
09:34 5 to Slide 3.

09:34 6 So, Your Honor, we thought it made sense,  
09:34 7 just to explain how we're going to go about this, to  
09:34 8 remind the Court of just some of the procedural history  
09:34 9 relevant to this particular motion.

09:34 10 So we had brought our motion, Google's  
09:34 11 motion, in 2021. And at the time all of the claims of  
09:34 12 the patent were asserted. So we directed our motion  
09:34 13 for summary judgment of invalidity of all of the claims  
09:35 14 of the patent. That was briefed.

09:35 15 In the course of this case as it's  
09:35 16 evolved over time, WSOU subsequently narrowed its  
09:35 17 asserted claims from this patent to Claims 2, 3, 5 and  
09:35 18 7. Thereafter WSOU brought its own motion for summary  
09:35 19 judgment of validity of Claim 3 under Section 101.

09:35 20 So we have, at least in part, cross  
09:35 21 motions for summary judgment, Your Honor, though  
09:35 22 brought separately as two different motions.

09:35 23 Of note are two things: One is that all  
09:35 24 of asserted Claims 2, 3, 5 and 7 are dependent claims.  
09:35 25 They depend from Claim 1. So we will spend a little

09:35 1 time talking about Claim 1, even though it's not  
09:35 2 asserted any longer.

09:35 3 And secondly, if we could go to Slide 4.

09:35 4 After these motions were briefed, the  
09:35 5 Court issued yet another decision on these issues. And  
09:35 6 that's in the Broadband iTV case from 2022 last  
09:35 7 September.

09:35 8 And to start with, that decision --  
09:36 9 decision's relevant for two reasons. As we'll see, the  
09:36 10 claim at issue there was remarkably similar to the  
09:36 11 issues we'll be talking about here.

09:36 12 But to start with, it sets forth the now  
09:36 13 familiar two steps under the Alice analysis. And in  
09:36 14 short, Google's argument is that the asserted -- the  
09:36 15 '806 patent and the asserted claims are all directed to  
09:36 16 an abstract idea.

09:36 17 And there is nothing, no basis for the  
09:36 18 Court to conclude other than that the claims do not  
09:36 19 contain something sufficient to transform them into a  
09:36 20 patent eligible -- or application or invention.

09:36 21 So if we could go, Mr. Garcia, to  
09:36 22 Slide 5.

09:36 23 Just to briefly establish the point that  
09:36 24 the patent makes clear from the very beginning that  
09:36 25 it's directed to, focused on and only makes claims that

09:36 1 get to targeted electronic content delivery control  
09:36 2 systems and methods. It's all about that. We've cited  
09:36 3 portions of the title and abstract here.

09:36 4 If we could go to Slide 6.

09:36 5 The description of the field of the  
09:37 6 invention, the summary of the invention, the background  
09:37 7 of the invention, all make it crystal clear that this  
09:37 8 patent relating to targeted content, specifically  
09:37 9 targeted advertising, but targeted content delivery.  
09:37 10 Which, as the Court is well familiar, there are  
09:37 11 abundant cases that talk about that as being an  
09:37 12 abstract idea.

09:37 13 Go to Slide 7.

09:37 14 So truly I think the issue here is, does  
09:37 15 a claim with that many words and that many -- at least  
09:37 16 to the simple philosophy, major technical sounding  
09:37 17 terms -- does that somehow become nonabstract? Or does  
09:37 18 that somehow become sufficient to get over Step 2 just  
09:37 19 because of all of those words and all of those  
09:37 20 technical terms?

09:37 21 And the answer is no.

09:37 22 The case law is very, very clear about  
09:37 23 that. That what we look to is what's the thrust of the  
09:37 24 claim? What is it doing? And this claim refers to a  
09:37 25 lot of preexisting, existing technologies. And we'll

09:37 1 talk about the details of that when we get into the  
09:37 2 Step 2 analysis. But it's all about picking the  
09:38 3 content to be delivered to someone.

09:38 4 Let's go to Slide 8.

09:38 5 Now, we have what's here on this issue  
09:38 6 the obligatory lots of cases slides. We will not go  
09:38 7 through all of those cases, I promise, Your Honor, and  
09:38 8 I promise the team.

09:38 9 But we want just to emphasize that this  
09:38 10 is an issue with which this Court is familiar and which  
09:38 11 many courts are familiar. And claims directed to  
09:38 12 collecting, analyzing and using intent data, claims  
09:38 13 relating to targeting the content, delivered to someone  
09:38 14 based on their history, are regularly routinely found  
09:38 15 in this Court and the Federal Circuit and the district  
09:38 16 courts to be abstract -- relate to abstract ideas, to  
09:38 17 be patent ineligible. And to fail the Step 1 analysis  
09:38 18 or require us to get to the Step 2 analysis.

09:38 19 Let's go to Slide 7 -- or, excuse me,  
09:38 20 Slide 9.

09:38 21 Thank you. Thank you, Mr. Garcia.

09:38 22 This is the collection of the cases that  
09:39 23 are cited also in our papers, but a collection of  
09:39 24 Federal Circuit decisions on exactly this point. We  
09:39 25 will not walk through all of them. They are all --

09:39 1 happy to address any of them, but they're all to the  
09:39 2 same point.

09:39 3 Your Honor cited the Intellectual  
09:39 4 Ventures, the Bridge & Post case, the Free Stream Media  
09:39 5 case and Customedia Techs and Your Honor's Broadband  
09:39 6 iTV decision, so we know the Court's familiar with  
09:39 7 these issues.

09:39 8 Let's go to Slide 10.

09:39 9 These are several district court cases,  
09:39 10 at least four of which OpenTV, Netflix, Morsa and Sound  
09:39 11 View Innovations were also cited in the Court's  
09:39 12 Broadband iTV decision.

09:39 13 And they all get to the same proposition,  
09:39 14 they all establish the same proposition that we don't  
09:39 15 think is meaningfully endowed in this case, which is  
09:39 16 that a claim such as Claim 1 which is directed to  
09:39 17 targeted content delivery is a patent-ineligible  
09:39 18 concept. So we have to do the Step 2 analysis.

09:39 19 So let's go to Slide 11.

09:39 20 So now we get to the analysis of Claim 1,  
09:39 21 again, the one independent claim, to determine whether  
09:40 22 it gets -- itself gets over the Step 2 analysis.

09:40 23 And the way we plan to proceed, Your  
09:40 24 Honor, is to talk about whether Claim 1 gets over the  
09:40 25 Step 2 analysis because then we just need to look at

09:40 1 what's added, the limitations that are added in the  
09:40 2 asserted dependent claims to see if they give us  
09:40 3 anything more that require us to look differently at  
09:40 4 them than we will, as you'll see, look at Claim 1.

09:40 5 And the answer is just because of all of  
09:40 6 those words, just because of those technical terms,  
09:40 7 Claim 1 doesn't get over the Step 2 analysis. It does  
09:40 8 nothing more than say, we want to target content using  
09:40 9 generic conventional hardware and components.

09:40 10 And it's not a matter of unique  
09:40 11 organization. It's not a matter of inventiveness that  
09:40 12 improves the performance of a computer. It's a matter  
09:40 13 of using well-known things to accomplish a goal that's  
09:40 14 an abstract idea.

09:40 15 But let's dive in a little bit more and  
09:40 16 look at Slide 12.

09:40 17 So Slide 12 is two claims. One is the --  
09:41 18 one of the claims that was considered by the Court in  
09:41 19 the Broadband iTV case, and one is the claims that --  
09:41 20 or the claim that was dealt with by the Federal Circuit  
09:41 21 in the Bridge & Post claim.

09:41 22 Both of these claims, notwithstanding  
09:41 23 their words, their length, their reference to  
09:41 24 technical-sounding terms, were determined to be patent  
09:41 25 ineligible and to not get over Step 2.

09:41 1 Claim 1 of the asserted patent in -- of  
09:41 2 the '806 patent in this case should suffer the same  
09:41 3 fate.

09:41 4 The Court's familiar with or has issued a  
09:41 5 decision sometime ago, so it may recall the Claim 1 of  
09:41 6 the iTV -- Broadband iTV case.

09:41 7 The Bridge & Post case is also worth the  
09:41 8 Court's attention in considering this issue. And it's  
09:41 9 worth noting as well that the Bridge & Post case  
09:41 10 affirmed a ruling finding invalidity on a motion to  
09:41 11 dismiss.

09:41 12 So this is a motion for summary judgment,  
09:41 13 but even on a motion to dismiss, these issues can  
09:41 14 properly be decided even with claims of this level of  
09:42 15 superficial but not actual complexity.

09:42 16 So let's turn to Slide 13.

09:42 17 Now, WSOU argues in a variety of ways  
09:42 18 that, well, we're missing the point. We're missing the  
09:42 19 characterization where we're not properly  
09:42 20 characterizing the claims.

09:42 21 Their primary argument to get to Claim 1  
09:42 22 and to get to the '806 patent overall is to say, well,  
09:42 23 you're missing the point. Because we're not -- we're  
09:42 24 dealing with providing targeted content delivery in the  
09:42 25 context of a maintained pattern of ongoing subscriber

09:42 1 behavior over time.

09:42 2 Now, I'm going to use a visual aid that's  
09:42 3 not on the screen. But I'll display it to the camera.  
09:42 4 It's two visual aids.

09:42 5 Here's my trusty notepad. Here's my pen.  
09:42 6 If I were to use the analogy that the Court used in the  
09:42 7 Broadband iTV case, the clerk of a video store, and I  
09:42 8 was keeping track of some lawyer named, let's say, Greg  
09:42 9 Lanier, who comes in and rents videos, I would start  
09:42 10 writing down what video Greg Lanier got and when he got  
09:42 11 it. What was the subject of the video.

09:43 12 And I notice, oh, he gets a lot of guitar  
09:43 13 videos. And over time I might notice, boy, he gets a  
09:43 14 lot of videos about Martin guitars. Then I might  
09:43 15 notice he gets a lot of videos about OM-18 guitars  
09:43 16 because he might be interested in buying one. So I'm  
09:43 17 going to give him an ad about that. Next time he comes  
09:43 18 in I'll give him a pamphlet.

09:43 19 But I would be doing that with my trusty  
09:43 20 pad and my trusty Uni-Ball pen, keeping track of it  
09:43 21 over time, in the context of a maintained pattern of  
09:43 22 ongoing subscriber behavior over time. And that is  
09:43 23 nothing I couldn't do on paper.

09:43 24 The Court's well familiar with the  
09:43 25 pen-and-paper test as one way to look at the both

09:43 1 abstract idea and getting over Step 2 analysis. This  
09:43 2 claim fails that test as characterized by WSOU.

09:43 3 Let's turn to Slide 14.

09:43 4 But we also know it fails the test by  
09:43 5 looking at what the patent itself says about what is  
09:43 6 claimed. So we have these claims with lots of words,  
09:43 7 lots of technical terms and lots of steps. But what  
09:43 8 you really notice here is that they actually say none  
09:44 9 of that matters.

09:44 10 Look what we have here on these excerpts  
09:44 11 from the specification. I won't read them into the  
09:44 12 record. They're on the slide, but they're all from  
09:44 13 Column 4, 6 and 7 of the '806 patent.

09:44 14 The components of the system may be  
09:44 15 implemented in any of various ways. Each component may  
09:44 16 be implemented in hardware, software, firmware or  
09:44 17 combinations. These components are described herein  
09:44 18 primarily in terms of their functions. We want  
09:44 19 something to be done. The components themselves are  
09:44 20 what matters.

09:44 21 And our present invention is not limited  
09:44 22 to any particular type of subscriber or network  
09:44 23 equipment. So the equipment doesn't matter.

09:44 24 Yet to our goal, and you've accomplished  
09:44 25 what we're claiming, it doesn't matter how you do it,

09:44 1 notwithstanding all the words of our claims.

09:44 2 But there's more. Slide 15.

09:44 3 The topology is typical. But there are  
09:44 4 many examples of these networks that are at issue that  
09:44 5 will be familiar. And the key sentence for me -- or  
09:45 6 two key sentences in the middle box in Column 5, Lines  
09:45 7 24 to 32: Since the present invention is not limited  
09:45 8 to any particular types of equipment, protocols or  
09:45 9 operation...

09:45 10 And then the third box: [The] memory  
09:45 11 devices [and the databases] are common in communication  
09:45 12 and processing equipment...

09:45 13 Now, we have slides that we've discussed  
09:45 14 in the papers as well. But it's clear the SAP case  
09:45 15 from the Federal Circuit makes it clear that invoking  
09:45 16 already existing computers and functionality doesn't  
09:45 17 get you over the Step 2 analysis.

09:45 18 Let's go to Slide 16.

09:45 19 Now, essentially WSOU says, boy, well,  
09:45 20 again, Google's missing the point. Because look at  
09:45 21 Figure 2. Look at system 20. Look how complicated  
09:45 22 that is. Look how many boxes there are. Look at how  
09:45 23 many steps and connections and communications and  
09:45 24 technical terms in all of these boxes and cylinders  
09:45 25 that we have there. It's got to be sufficient to get

09:45 1 over step 2.

09:45 2 It's not abstract if it gets over Step 2.

09:46 3 But, again, the specification, the discussion of the

09:46 4 patent belies that.

09:46 5 And what we got here is Lines 11 to 28 of

09:46 6 Column 6 of the specification of the '806 patent and it

09:46 7 emphasizes the same things I've already said: The

09:46 8 components of system 20 and the interconnections

09:46 9 between those components may be implemented in any of

09:46 10 various ways.

09:46 11 They may be local connections. They may

09:46 12 be network connections. But the sentence that's really

09:46 13 key here is the second sentence of the first paragraph:

09:46 14 Other embodiments may include fewer, further or

09:46 15 different components with similar or different

09:46 16 interconnections than shown.

09:46 17 So this isn't an enablement analysis or a

09:46 18 written description analysis or a novelty analysis.

09:46 19 This is just the question of does the abstract idea --

09:46 20 or is there anything in the claims that gets the

09:46 21 abstract idea of targeting content delivery, including

09:46 22 advertising, over the hurdle of Step 2?

09:46 23 And the answer is the specification tells

09:46 24 you no. They are just simply invoking existing

09:47 25 functionality, known functionality. And it doesn't

09:47 1 even matter how -- what the components are or how  
09:47 2 they're arranged. And it's all functional.

09:47 3 So we respectfully submit, for all the  
09:47 4 reasons we've articulated in our papers, that at this  
09:47 5 point we've demonstrated that Claim 1 fails the  
09:47 6 analysis.

09:47 7 So now we turn to the asserted claims,  
09:47 8 Claims 2, 3, 5 and 7, to determine whether anything  
09:47 9 added to them gets over Step 2.

09:47 10 And just as a sidenote, Your Honor, I'm  
09:47 11 going to deal with Claims 2, 5 and 7 first because  
09:47 12 that's our affirmative motion for summary judgment.  
09:47 13 And then we'll come back to Claim 3 which -- and  
09:47 14 respond also to WSOU's motion for summary judgment. So  
09:47 15 2 5, 7, and then I'll get to Claim 3.

09:47 16 So Slide 17 shows this Claim 2. We've  
09:47 17 got the additional limitations. So the first question  
09:47 18 is: Is there anything about this claim that makes it  
09:47 19 not an abstract idea?

09:47 20 And the answer's no. All it does is it  
09:47 21 takes this targeted -- this idea of targeted content  
09:47 22 delivery and says, we are going to focus -- we're going  
09:47 23 to make our decisions based on one type of content.

09:48 24 As if I decided using my trusty pad and  
09:48 25 paper to say, I am only going to look for videos where

09:48 1 that Greg Lanier lawyer came in with his wife, what did  
09:48 2 they like together?

09:48 3 We're going to narrow down the sources of  
09:48 4 information we look to. That does not make this idea  
09:48 5 or this claim patent eligible.

09:48 6 So then we look to see whether there's  
09:48 7 any dispute that it doesn't get over Step 2.

09:48 8 Let's go to Claim -- Slide 18, please.

09:48 9 And it doesn't. And we know it doesn't  
09:48 10 because there's no dispute of fact here. We brought a  
09:48 11 motion for summary judgment. WSOU's argument is, well,  
09:48 12 there's disputes of fact because we've -- each  
09:48 13 dependent claim adds meaningful limitations.

09:48 14 But whether that limitation is meaningful  
09:48 15 for the analysis here is something this Court can  
09:48 16 decide as a matter of law. There's no actual dispute  
09:48 17 of fact. There's simply the attorney assertion that  
09:48 18 there is a dispute of fact.

09:48 19 We've cited the Dropbox case as one of  
09:48 20 many that makes it clear you can't just rely on  
09:48 21 attorney assertions, but it's also -- the undisputed  
09:49 22 argument -- or it's undisputed that there isn't any  
09:49 23 dispute here. That meaningful limitation says, we're  
09:49 24 going to narrow down the source of the information we  
09:49 25 consider to target content.

09:49 1 That is something that is, you know, as  
09:49 2 old as targeted advertising, as old as the specialized  
09:49 3 Yellow Pages that might get dropped on your driveway  
09:49 4 depending on what neighborhood you live in, what city  
09:49 5 you live in, depending on what different providers of  
09:49 6 those decide to consider as their sources of  
09:49 7 information.

09:49 8 So Claim 2 fails. There's no dispute of  
09:49 9 fact preventing summary judgment that Claim 2 is  
09:49 10 invalid under Section 101.

09:49 11 Let's turn to Claim 5 on Slide 19.

09:49 12 Now, Claim 5 does even worse because  
09:49 13 Claim 5 just says, well, the targeted electronic  
09:49 14 content is an advertisement. And we will not repeat  
09:49 15 all the cases. We will not repeat the point, other  
09:49 16 than to say it's unequivocal that targeting advertising  
09:49 17 is a patented-ineligible concept under abundant  
09:49 18 authority, including authority from this Court.

09:49 19 So let's look to see, well, is there  
09:50 20 something that's claimed in there that gets over Step  
09:50 21 2?

09:50 22 Slide 20.

09:50 23 The answer's no. It's exactly the same  
09:50 24 argument. And that's telling, Your Honor. WSOU's  
09:50 25 argument in opposition to our motion for summary

09:50 1 judgment as to Claims 2, 5 and 7 is exactly the same.  
09:50 2 It's the same words, it's the same piece of their  
09:50 3 argument. Each dependent claim adds meaningful  
09:50 4 limitations.

09:50 5 There's nothing about that limitation  
09:50 6 that makes this claim patent eligible. There's nothing  
09:50 7 about it that says, well, there's something here  
09:50 8 that -- there's something that renders that  
09:50 9 patent-ineligible concept to be patent eligible.  
09:50 10 There's nothing technical. There's nothing about  
09:50 11 improving the performance of the computer at all.

09:50 12 We won't repeat anymore. But we think  
09:50 13 we've -- it's abundantly clear that Claim 5 is also  
09:50 14 patent ineligible under -- or invalid under 101.

09:50 15 Go to Slide 21 and Claim 7.

09:50 16 This is the last of the dependent claims  
09:50 17 where -- remaining in the case where we have moved for  
09:50 18 summary judgment and WSOU has not moved for summary  
09:50 19 judgment of validity.

09:51 20 And this one -- actually it's got a  
09:51 21 technical term in it. The added limitation is: One or  
09:51 22 more network elements for providing a subscriber system  
09:51 23 access to electronic content through the access  
09:51 24 network.

09:51 25 But, again, all this does is say we will

09:51 1 use existing things to target our advertising. It  
09:51 2 doesn't turn the ineligible idea into an eligible one.  
09:51 3 And as we saw from the specification --

09:51 4 Let's go to Slide 22.

09:51 5 We saw from the specification earlier how  
09:51 6 this -- the '806 patent makes it clear it doesn't  
09:51 7 matter what components you use. It doesn't matter how  
09:51 8 you arrange them. We just want to achieve a result --  
09:51 9 however you achieve our result, that's practicing what  
09:51 10 we've claimed.

09:51 11 And for that reason Claim 7 fails, just  
09:51 12 like Claims 2 and Claim 5 and Claim 1 before that, even  
09:51 13 though it's no longer asserted. And, again, WSOU makes  
09:51 14 the same argument. But there's no dispute of fact  
09:51 15 here. There's an attorney assertion about a meaningful  
09:51 16 limitation. But that fails for the reasons I've  
09:51 17 described with respect to the other claims.

09:52 18 So now let's go to Slide 23.

09:52 19 And here we have -- this is where WSOU's  
09:52 20 cross-moved for summary judgment of validity. So here  
09:52 21 the key -- the one key point is that the parties agree  
09:52 22 that summary judgment's appropriate on Claim 3. It's  
09:52 23 just a question of which way that, you know, ought to  
09:52 24 go.

09:52 25 We think we've established it's

09:52 1 appropriate as to Claims 2, 5 and 7. But focused on  
09:52 2 Claim 3 now where we agree summary judgment's  
09:52 3 appropriate.

09:52 4 Basically what WSOU says -- and I could  
09:52 5 see why they picked this one claim because at least  
09:52 6 it's got a few more technical terms in it. But it also  
09:52 7 fails the Alice analysis.

09:52 8 First, let's start off with Claim 3. It  
09:52 9 says, okay, let's take Claim 1 which we've already  
09:52 10 established is patent-ineligible. And let's have: A  
09:52 11 Deep Packet Inspection module that operatively coupled  
09:52 12 to the behavioral information collector and operable to  
09:52 13 monitor the access communication traffic.

09:53 14 So let's take a bunch of things that  
09:53 15 we're not actually claiming we didn't invent, we didn't  
09:53 16 improve, we didn't do anything to but use those known  
09:53 17 things to accomplish this goal. Doesn't render this  
09:53 18 patent eligible. And that doesn't get over Step 2.

09:53 19 Now, they say a bunch of things to  
09:53 20 suggest to Your Honor that, well, of course it does.  
09:53 21 It's an unconventional arrangement at a location remote  
09:53 22 from the subscriber device.

09:53 23 There are a couple of problems with that.  
09:53 24 That's actually attorney assertion, pure attorney  
09:53 25 argument, not supported by facts. It's also

09:53 1 inconsistent with the language of the specification  
09:53 2 that says it actually doesn't matter where everything  
09:53 3 is.

09:53 4 And lastly, it's not in the claim. The  
09:53 5 claim doesn't talk about that. And other cases we've  
09:53 6 cited, the Ultramercial versus Hulu case here make  
09:53 7 clear that just saying we'll do this, not just on a pen  
09:53 8 and paper, but do that over the Internet, that doesn't  
09:53 9 make something patent eligible. And it doesn't get  
09:53 10 over Step 2.

09:53 11 Let's go to Slide 24.

09:53 12 So they also say, well, we're using this  
09:54 13 behavioral information clicker and a DPI module, and  
09:54 14 we're going to reduce computational resource usage on  
09:54 15 subscriber devices.

09:54 16 Again, pure assertion, no evidence, no  
09:54 17 facts, no nothing. Number one.

09:54 18 Number two, known components that exist.  
09:54 19 There's no question that everything here is known,  
09:54 20 we're just saying use these known things to accomplish  
09:54 21 our goal.

09:54 22 And as we established before -- and I  
09:54 23 won't repeat this is, it doesn't matter what components  
09:54 24 you use. It doesn't matter how you arrange them. It's  
09:54 25 purely functional claiming. And, again, putting aside

09:54 1 whether that's appropriate claiming, it doesn't get you  
09:54 2 over Step 2.

09:54 3 Let's look to Slide 25.

09:54 4 And that's another emphasis on a specific  
09:54 5 technique for sampling a network subscriber's  
09:54 6 communication traffic.

09:54 7 And what's really interesting here, we  
09:54 8 should have highlighted the word "recites."  
09:54 9 Furthermore, Claim 3 recites a specific technique. And  
09:54 10 absolutely it does. No question.

09:55 11 But it recites, it's saying use this  
09:55 12 thing everybody knows about as the specification,  
09:55 13 Column 6, Lines 38 to 47, makes crystal clear.  
09:55 14 Something people already know about, let's use that  
09:55 15 thing to accomplish our goal. That doesn't render this  
09:55 16 a patent-eligible claim, and it doesn't get over Step  
09:55 17 2.

09:55 18 Let's turn to Slide 26.

09:55 19 So, again, last-ditch effort, you know,  
09:55 20 maybe cookies will save the day. Cookies saved the day  
09:55 21 in many contexts. It certainly saved many of my days  
09:55 22 at the end of a long one, but they don't save things  
09:55 23 here.

09:55 24 The fact that this is a -- created a  
09:55 25 targeted electronic content delivery system that does

09:55 1 not rely on cookies and enables cookieless sampling and  
09:55 2 more accurate behavior profiling, again, taking  
09:55 3 advantage of existing technology, not claimed, not  
09:55 4 invented, not improved, this is simply using known  
09:55 5 techniques to accomplish a goal described in a way that  
09:56 6 makes it clear.

09:56 7 It doesn't matter what known components  
09:56 8 you use. It doesn't matter how you arrange them as  
09:56 9 long as you achieve the goal of our essentially  
09:56 10 functional claiming.

09:56 11 And the Federal Circuit's actually  
09:56 12 addressed this pretty specifically in the Bridge & Post  
09:56 13 case, you know, and again on a motion to dismiss, not  
09:56 14 even a motion for summary judgment: According to the  
09:56 15 patentee, its inventions solved the problem of  
09:56 16 privacy-concerned users deleting cookies and tracking  
09:56 17 data by using a persistent device identifier which may  
09:56 18 not be deleted or changed.

09:56 19 And so no cookies is basically what that  
09:56 20 case is saying. And what that case also said is just  
09:56 21 saying that without actually inventing it, without  
09:56 22 actually developing it, saying no cookies is one thing.  
09:56 23 Saying a cookie without chocolate chips is one thing.  
09:56 24 But if you don't provide the recipe and make a better  
09:56 25 cookie and tell people how to do it, that's not what

09:56 1 you're claiming. That's not what's going on here.

09:56 2 So that doesn't help, as well, get Claim  
09:56 3 3 over the hump of Alice.

09:56 4 Let's go to Slide 27.

09:56 5 So this is just a couple more cases, Your  
09:57 6 Honor, to really just emphasize the point.

09:57 7 What we are dealing with here is a patent  
09:57 8 and an alleged invention that are absolutely  
09:57 9 unequivocally directed to the abstract concept of  
09:57 10 targeted content delivery saying, we're, going to only  
09:57 11 consider certain sources of information or we're going  
09:57 12 to focus on advertising or we're going to use these  
09:57 13 particular known techniques to accomplish that goal.  
09:57 14 Does not say anything of the asserted claims or the  
09:57 15 Independent Claim 1 under which they will -- on which  
09:57 16 all those dependent claims rely.

09:57 17 And as a result, Google respectfully  
09:57 18 submits we're entitled to summary judgment of  
09:57 19 invalidity of all those claims under Section 101.

09:57 20 And I'll stop there now, unless Your  
09:57 21 Honor has any questions or if there's anything to say  
09:57 22 after we hear from WSOU.

09:57 23 THE COURT: Nope. Look forward the  
09:57 24 hearing a response.

09:57 25 MS. FELLOWES: Thank you, Your Honor.

09:58 1 The first point that I'd like to address  
09:58 2 is that of course this patent uses technical terms.  
09:58 3 This a technical invention. This is an invention about  
09:58 4 a computer system. It isn't simply words that have  
09:58 5 been added to the claim in order to give it bulk.  
09:58 6 These are the necessary descriptors of the components  
09:58 7 that make up the invention, and in particular the  
09:58 8 invention that is claimed in Claim 3.

09:58 9 I appreciate the pen and paper analogy,  
09:58 10 but there isn't a video clerk in the world who's using  
09:58 11 deep packet inspection on Layers 3 through 7 of the RSI  
09:58 12 model. It simply isn't appropriate to reduce what is a  
09:58 13 complex invention down to pen and paper.

09:58 14 Now, the reason I want to dive into Claim  
09:58 15 3 -- and if you'll give me a second, I'm just going to  
09:58 16 pull up our slides.

09:58 17 And I'm now finding it tricky to advance.  
09:59 18 There we go.

09:59 19 The reason we focused on Claim 3 is  
09:59 20 precisely because it identifies one of the key  
09:59 21 inventive concepts that are relevant to this argument.

09:59 22 Now, Mr. Lanier pointed to this notion  
09:59 23 that everything is known. It doesn't matter how you  
09:59 24 put it together. These are known components. You can  
09:59 25 rearrange them as you want.

09:59 1 First of all, it does matter how they are  
09:59 2 arranged. That is part of the claim. Secondly, a  
09:59 3 novel arrangement of conventional components is  
09:59 4 patentable. And that's not really in dispute.

09:59 5 What is problematic about Google's  
09:59 6 argument is that they have taken broader language from  
09:59 7 the specification. And in doing so, they've erased the  
09:59 8 limitations that are present in the claims.

09:59 9 Claim 3 does not claim any arrangement of  
09:59 10 components. It doesn't claim any arrangement of  
10:00 11 components for delivering targeted electronic content  
10:00 12 to a subscriber. In fact, it claims a rather specific  
10:00 13 method of doing it -- excuse me -- arrangement of  
10:00 14 components for doing that. And it claims a deep packet  
10:00 15 inspection module which is operatively coupled to the  
10:00 16 behavioral information collector and operable to  
10:00 17 monitor the access communication traffic.

10:00 18 Now, the deep packet inspection module is  
10:00 19 described in the specification, Column 6, Line 44  
10:00 20 through 47. But the important feature of that is that  
10:00 21 it talks about the way in which the information is  
10:00 22 evaluated for the purposes of delivering the targeted  
10:00 23 electronic content.

10:00 24 It isn't simply recording what kinds of  
10:00 25 videos have been watched in the past. This is a way of

10:00 1 assessing across different types of communication  
10:00 2 traffic, which are passed over an access communication  
10:00 3 link, and examining that data below the level of the  
10:01 4 packet header in order to pinpoint the specific data  
10:01 5 that is important and that merits attention.

10:01 6 This makes the -- excuse me -- this makes  
10:01 7 the evaluation of the communication traffic for the  
10:01 8 purposes of the invention of Claim 3 both more  
10:01 9 comprehensive in that it evaluates across communication  
10:01 10 types and also more specific. Because it targets that  
10:01 11 information that is important for assessing what  
10:01 12 targeted electronic content should be delivered to the  
10:01 13 subscriber.

10:01 14 Now, there are a couple of specific  
10:01 15 arguments that I'd like to address from Google.

10:01 16 The first is this notion that the  
10:01 17 location of the deep packet inspection module is not  
10:01 18 specified anywhere. I believe that was in Slide 23.

10:01 19 If you'll give me a moment, I'm just  
10:01 20 going to switch over for a second to Figure 2. I'll  
10:01 21 pull that up in just a moment.

10:02 22 Here you have -- in Figure 2, you have  
10:02 23 the components of the system. And, yes, it is complex.  
10:02 24 It is necessarily complex. This is a computer system  
10:02 25 for assessing communication traffic, the content of

10:02 1 that communication traffic, and then delivering  
10:02 2 targeted electronic content with the selected  
10:02 3 electronic content to the subscriber.

10:02 4 Now, you'll recall in Claim 3, the deep  
10:02 5 packet inspection module is coupled to the behavioral  
10:02 6 information collector. And the claims are read in  
10:02 7 light of the specification, and you'll see in Figure 2  
10:02 8 the location is identified.

10:02 9 Here we have as No. 28, if you look at  
10:02 10 the bottom of Figure 2, there are specific places that  
10:02 11 that behavioral information collector can be located.  
10:02 12 It can be located in the access network, as exemplified  
10:02 13 by Nos. 28 and No. 32; or it can be in an offline  
10:02 14 position next to the access network, and that is  
10:03 15 identified in Item No. 34.

10:03 16 Importantly, it's not on the subscriber  
10:03 17 device. And that's why this is relevant to one of the  
10:03 18 key advantages of the invention.

10:03 19 Yes. Cookies are known. And,  
10:03 20 importantly, this invention is not claiming the  
10:03 21 presence of cookies or the absence of cookies. What it  
10:03 22 is claiming is a system that allows for the  
10:03 23 identification of the important information within the  
10:03 24 communication traffic, and it does that without  
10:03 25 draining the computational resources of the subscriber

10:03 1 device.

10:03 2 It is possible to use cookies and a  
10:03 3 narrow subset of communication traffic to accomplish  
10:03 4 not the claimed invention but to accomplish the  
10:03 5 delivery of advertisement. We're not arguing that.

10:03 6 But, importantly, this differs. And this  
10:03 7 differs because the deep packet inspection module is  
10:03 8 used coupled to a specific behavioral information  
10:04 9 collector, which is in a specific location relative to  
10:04 10 the subscriber device in order to deliver targeted  
10:04 11 electronic content with the selected electronic content  
10:04 12 by the subscriber.

10:04 13 What's problematic especially about  
10:04 14 Google's argument is that by constantly saying these  
10:04 15 things are known, they've injected attorney argument,  
10:04 16 the very thing they've accused WSOU of doing.

10:04 17 Particularly, Slide 28, that is attorney  
10:04 18 argument. Saying that a deep packet inspection module  
10:04 19 is conventional, is well-known and, importantly, is  
10:04 20 conventional and well-known in this particular role  
10:04 21 with respect to the invention of Claim 3, that is  
10:04 22 attorney argument. They've stated it, but they've not  
10:04 23 shown it. And that's the key distinction.

10:04 24 Also, there seems to be a validity  
10:04 25 analysis and, more importantly, an obviousness analysis

10:04 1 that is being imported into Google's argument.

10:04 2 It is not a question of whether or not  
10:04 3 they can locate another patent that may render this  
10:05 4 patent obvious. That is a fight that I am certain we  
10:05 5 will have another day. But that does not mean that  
10:05 6 this patent is patent ineligible.

10:05 7 And just to be clear, I'm not conceding  
10:05 8 that it's obvious either. I'm simply making the  
10:05 9 distinction between what is patent eligible and what is  
10:05 10 patent eligible and may be obvious.

10:05 11 They've said that these are well-known  
10:05 12 components. They can be any arrangement you want. But  
10:05 13 I think I've demonstrated, it can't be any arrangement.  
10:05 14 It has to be the specific arrangement as demonstrated  
10:05 15 in the specification.

10:05 16 And the claims are not unbounded. They  
10:05 17 are limited. And as Claim 3 makes clear, that means  
10:05 18 that a deep packet inspection module, which cannot be  
10:05 19 reduced to a pen-and-paper analogy, is used to examine  
10:05 20 the information within the packets below the header  
10:05 21 level and to establish what information is important  
10:06 22 for determining what targeted electronic content needs  
10:06 23 to be delivered.

10:06 24 It's relevant that it can sample across  
10:06 25 different types of communication traffic, not just

10:06 1 simply HTTP traffic. And this emphasizes all sorts  
10:06 2 of -- rather, this illustrates the problems with the  
10:06 3 prior art that were identified within the patent.

10:06 4 The problems with the prior art arose  
10:06 5 because the delivery of targeted electronic content,  
10:06 6 could be advertisements, but it could be other targeted  
10:06 7 electronic content, broadly fell into three buckets.  
10:06 8 And each of those three buckets had problems.

10:06 9 The first was delivery of targeted  
10:06 10 electronic content with the content that you had  
10:06 11 selected, that the subscriber had selected. And that  
10:06 12 was simply -- if you watch Game of Thrones, you may be  
10:06 13 interested in other things -- excuse me -- relating to  
10:07 14 fantasy or dragons or something like that.

10:07 15 Sorry. I haven't actually seen Game of  
10:07 16 Thrones. I may be the lone person on this planet who  
10:07 17 hasn't seen it.

10:07 18 THE COURT: No. There are two of us.

10:07 19 (Laughter.)

10:07 20 MS. FELLOWES: Okay. All right. Well,  
10:07 21 I'm glad to know I'm not alone in that.

10:07 22 THE COURT: You're not.

10:07 23 MS. FELLOWES: The second was delivery  
10:07 24 with search. And that was simply if a subscriber put  
10:07 25 in a search string, that search string was used to

10:07 1 deliver targeted electronic content related to that  
10:07 2 search string.

10:07 3 So for instance, if I searched for baby  
10:07 4 onesies, I might get targeted electronic content  
10:07 5 regarding nappies.

10:07 6 And lastly, there was this notion of  
10:07 7 delivery of targeted electronic content with behavior,  
10:07 8 subscriber behavior. But that profile of subscriber  
10:07 9 behavior was limited. Crucially it was limited to only  
10:07 10 the subscriber behavior that could be determined  
10:07 11 through either direct searches or through the use of  
10:07 12 cookies on the subscriber device.

10:08 13 And as we've discussed, that consumes  
10:08 14 computational resources. And that is a problem that  
10:08 15 needed to be overcome. And that's why the arrangement  
10:08 16 of the components that are claimed, particularly in  
10:08 17 Claim 3, are so important to this invention.

10:08 18 It is an inventive system. The fact that  
10:08 19 it doesn't drain those computational resources, the  
10:08 20 fact that the DPI module which is coupled to the  
10:08 21 behavioral information collector is remote from the  
10:08 22 subscriber device, these are things that add to the  
10:08 23 inventive concept.

10:08 24 And this is why, Your Honor, we pointed  
10:08 25 to, in our supplemental authority, the Cooperative

10:08 1 Entertainment versus Kollektive Technology case which  
10:08 2 came out of the Federal Circuit in September of last  
10:08 3 year. And that's a case that recognized that not every  
10:08 4 computer system is patent ineligible simply because it  
10:08 5 is a computer system.

10:08 6 Computer networks will use known  
10:08 7 components. You must build a computer network from its  
10:08 8 building blocks. That's not in -- that's not the  
10:09 9 subject of our disagreement. But the case did point  
10:09 10 out there can be an inventive concept in a particular  
10:09 11 arrangement for distributing content within that  
10:09 12 network.

10:09 13 I don't need to go into the details of  
10:09 14 the case. The point is that of all the cases that  
10:09 15 Google has cited, and I agree there are many, there are  
10:09 16 also many that go the other way. And that because this  
10:09 17 is a fact-specific analysis, it can't be generalized.

10:09 18 And so all we're asking is that Your  
10:09 19 Honor take a specific look at the claims of this  
10:09 20 patent, in particular Claim 3, and recognize that --  
10:09 21 the inventive arrangement of components and the use of  
10:09 22 a novel module in a novel arrangement is the key to  
10:09 23 this invention and, thus, it is patent eligible.

10:09 24 Thank you, Your Honor. If you have any  
10:09 25 questions, please let me know.

10:09 1 THE COURT: I'm good.

10:09 2 Mr. Lanier?

10:09 3 MR. LANIER: Brief response, Your Honor.

10:09 4 And, Mr. Garcia, if we could switch over.

10:10 5 And, Mr. Garcia, please pull up Slide 24.

10:10 6 MS. FELLOWES: Yes. I'm sorry. I will  
10:10 7 stop sharing.

10:10 8 MR. LANIER: Thank you.

10:10 9 And just so the record's clear, I also  
10:10 10 have not seen the Game of Thrones, so...

10:10 11 (Laughter.)

10:10 12 MS. FELLOWES: We're the last holdouts.

10:10 13 MR. LANIER: Good.

10:10 14 So, Your Honor, if I wanted to build a  
10:10 15 better mousetrap, I might think, well, there's some  
10:10 16 problems with mice. We actually have -- we have a  
10:10 17 chicken coupe out back, and we have a problem with mice  
10:10 18 and other critters. And I'd like something that  
10:10 19 catches smaller ones and bigger ones.

10:10 20 So I might say, solve the problem with  
10:10 21 keeping chickens by coming up with a mousetrap that  
10:10 22 catches smaller mice and coming up with a mousetrap  
10:10 23 that catches larger mice and place it optimally to  
10:10 24 catch the mice, right?

10:10 25 That's a great idea. Build a better

10:10 1 mousetrap and the world will beat a path to your door,  
10:10 2 I believe, is the analogy. But unless I tell you how  
10:10 3 to build that mousetrap that catches smaller mice or  
10:10 4 bigger mice or how to place it somewhere in a way  
10:10 5 that's other than just saying "accomplish my goal," I  
10:10 6 don't have a patentable invention. I have simply tried  
10:11 7 to claim an abstract idea, and that's what's going on  
10:11 8 here.

10:11 9 Now, it appears that we do not have much  
10:11 10 to talk about on Claims 1, 2, 5 and 7. So we'll focus  
10:11 11 on Claim 3.

10:11 12 And if we could go, Mr. Garcia, to Slide  
10:11 13 24. I apologize.

10:11 14 So let's start with Claim 3. And just  
10:11 15 briefly, Your Honor, what we heard is that the  
10:11 16 invention is patent-eligible. And it gets over Step 2  
10:11 17 because there's a recitation of a deep packet  
10:11 18 inspection module operatively coupled to the behavioral  
10:11 19 information collector and operable to monitor the  
10:11 20 access communication traffic. That's what we heard,  
10:11 21 boiling it all down.

10:11 22 And we also heard that, boy, Google says  
10:11 23 that that's attorney argument. But that stuff's  
10:11 24 well-known. But that's actually not our argument.  
10:11 25 That's what the patent tells us.

10:11 1 Let's turn to Slide 25.

10:11 2 And the '806 patent, Column 6, Lines 38  
10:11 3 to 47 makes it crystal clear that you could use an --  
10:12 4 as -- it could be implemented as an extended deep  
10:12 5 packet inspection DPI platform. Use of initial caps,  
10:12 6 use of an acronym makes it -- without any other  
10:12 7 explanation, no claiming of what is that thing? How  
10:12 8 does it work? How do you operatively couple it? How  
10:12 9 do you use it? Here is that thing. They are taking  
10:12 10 advantage of a known technology.

10:12 11 Then we also heard that, well, look at  
10:12 12 Figure 2.

10:12 13 Let's go to Slide 16, please.

10:12 14 Look at Figure 2. Look how complex that  
10:12 15 is. It really matters. And as Ms. Fellowes argued, we  
10:12 16 agree. Read the claims in light of the specification.

10:12 17 So we just commend the Court to the '806  
10:12 18 patent, Column 6, Lines 7 to 28, the specification's  
10:12 19 discussion at Figure 2. That makes it crystal clear.  
10:12 20 It doesn't matter what you use. It doesn't matter how  
10:12 21 you connect it. It doesn't matter, as long as you  
10:12 22 achieve our goal.

10:12 23 So use DPI to narrow down the sources of  
10:13 24 information. Use DPI to deliver certain types of  
10:13 25 information together. Use DPI to avoid having cookies

10:13 1 on people's computers. None of that is the invention.

10:13 2 The question before the Court is whether  
10:13 3 the invention is patent-eligible and valid under  
10:13 4 Section 101. And the invention is not. Because the  
10:13 5 invention is not DPI. The invention is now it's  
10:13 6 coupled. The invention is apply a bunch of well-known  
10:13 7 techniques to deliver targeted content, including  
10:13 8 targeted advertising.

10:13 9 And additionally, in the notice of  
10:13 10 supplemental authority there was the case that  
10:13 11 Ms. Fellowes mentioned, a very different case with very  
10:13 12 different facts. We commend that to the Court. Much  
10:13 13 more detailed computer invention there.

10:13 14 And at that same time in our response to  
10:13 15 the notice of supplemental authority we've pointed out  
10:13 16 what began with which is this Court's discussion of  
10:13 17 Broadband iTV. Claim 1 of the '825 patent is  
10:13 18 remarkably similar to the claim at issue here. These  
10:14 19 claims are not patent-eligible. They don't get over  
10:14 20 Step 2.

10:14 21 And we respectfully submit that all of  
10:14 22 the asserted claims, all the claims, but all of the  
10:14 23 asserted claims certainly, are invalid under Section  
10:14 24 101.

10:14 25 And unless the Court has additional

10:14 1 questions, I would stop there.

10:14 2 THE COURT: Any rebuttal?

10:14 3 MS. FELLOWES: Just briefly, Your Honor,  
10:14 4 to point out that while, yes. The claims must be read  
10:14 5 in light of the specification, you can't then import  
10:14 6 the general language within the specification to the  
10:14 7 claims. There's a reason the claims include the  
10:14 8 specific limitations that they do.

10:14 9 And one of the specific limitations is  
10:14 10 that the DPI module is used in an arrangement within  
10:14 11 the access network that's coupled to the behavioral  
10:14 12 information collector.

10:14 13 And by virtue of being operatively  
10:14 14 coupled to the behavioral information collector, it's  
10:14 15 located in a way that lets it access communication  
10:14 16 traffic and assess the information from within that  
10:14 17 communication traffic that lets it deliver the targeted  
10:14 18 electronic content.

10:15 19 This isn't -- my aim is not to simply  
10:15 20 just throw out technical terms, but rather to emphasize  
10:15 21 that because the specification says that in other  
10:15 22 embodiments things may be arranged differently, that  
10:15 23 doesn't mean they can be arranged differently within  
10:15 24 the context of Claim 3.

10:15 25 Also importantly, Claim 1 does require a

10:15 1 particular arrangement. Claim 1 is not simply that any  
10:15 2 component can be in any order. It requires the  
10:15 3 arrangement of specific components that are coupled to  
10:15 4 each other in order to accomplish the goal of assessing  
10:15 5 the communication traffic and, on that basis,  
10:15 6 delivering targeted electronic content with the  
10:15 7 subscriber-selected electronic content.

10:15 8 So I simply disagree. I think it's  
10:15 9 attorney argument to say that anything that I pull from  
10:15 10 the specification regarding any other embodiment can be  
10:15 11 imported into Claim 1 and also Claim 3.

10:15 12 That's all I have, Your Honor.

10:16 13 THE COURT: Mr. Lanier, anything else?

10:16 14 MR. LANIER: No, Your Honor.

10:16 15 THE COURT: I'll be back in a few  
10:16 16 seconds.

10:16 17 (Pause in proceedings.)

10:20 18 THE COURT: Okay. I'm going to go back  
10:21 19 on the record.

10:21 20 And I just want to make sure my  
10:21 21 understanding is correct that -- and I'll start with  
10:21 22 Mr. Lanier.

10:21 23 Google is moving for summary judgment  
10:21 24 with respect to Section 101 on all of the claims that  
10:21 25 Google is still -- I don't remember the exact numbers.

10:21 1 It was -- I think there were four of them, 3 -- Claim 3  
10:21 2 and some others.

10:21 3 And your motion is for summary judgment  
10:21 4 on all the claims that are -- that Google's still  
10:21 5 arguing over essentially, correct?

10:21 6 MR. LANIER: That's correct, Your Honor.

10:21 7 THE COURT: Okay. I'm going to grant  
10:21 8 that motion with the exception of Claim 3.

10:21 9 With regard to Claim 3, I'm going to deny  
10:22 10 both motions, Google's motion and plaintiff's -- I'm  
10:22 11 sorry. Yes. Plaintiff's cross-motion -- or I don't  
10:22 12 know if it's cross. I guess it is. Y'all filed first.

10:22 13 But I'm denying it with respect to Claim  
10:22 14 3, and we'll take up that issue at trial with respect  
10:22 15 to the second question.

10:22 16 Now, that means we have a Markman to do,  
10:22 17 which always excites me. And so I look very much  
10:22 18 forward to hearing especially -- no offense to anyone,  
10:22 19 but I look forward to hearing the young person who's  
10:22 20 going to get to argue. That always -- I think it's one  
10:22 21 of the great things I get to do.

10:22 22 The claim term is "Internet Protocol  
10:22 23 Television (IPTV) service." And I'll hear first from  
10:22 24 the defendant.

10:22 25 MR. LANIER: Thank you, Your Honor.

10:22 1 We're arguing over that still because  
10:22 2 that claim appears in Independent Claim 1, which is no  
10:22 3 longer asserted. So it's part of Claim 3, which  
10:23 4 remains alive for now.

10:23 5 Let's go to Slide 30.

10:23 6 We appreciate the Court taking time to  
10:23 7 have offered preliminary constructions on all of the  
10:23 8 issues that were up there.

10:23 9 And so the record's clear, I just happen  
10:23 10 to be the one who was arguing 572. Your Honor would  
10:23 11 have heard from many other people, but we decided to  
10:23 12 focus down the issues. So my apologies for that.

10:23 13 But the reason we're putting up Slide 30  
10:23 14 is to show what the dispute was that was actually  
10:23 15 originally presented to the Court.

10:23 16 It wasn't just the dispute between plain  
10:23 17 and ordinary meaning and the construction Google  
10:23 18 proposed. It was really TV over the Internet. That's  
10:23 19 actually the construction for which WSOU has been  
10:23 20 arguing. And adopting plain and ordinary meaning with  
10:23 21 nothing more risks adopting that construction.

10:23 22 Let's go to Slide 31.

10:23 23 So we recognize the Court has made that  
10:23 24 preliminary construction of plain and ordinary meaning.  
10:23 25 And while we believe that the construction we had

10:24 1 originally proposed was correct, we have offered two  
10:24 2 alternative constructions that get at the real mischief  
10:24 3 of what we think WSOU's actual argument is. TV over  
10:24 4 the Internet is enough to be IPTV as used in the patent  
10:24 5 claims.

10:24 6 And so the first construction strikes out  
10:24 7 a variety of words and removes one word. So our first  
10:24 8 alternate proposed construction is: Television content  
10:24 9 delivered over a private, managed Internet protocol IP  
10:24 10 network connection.

10:24 11 Alternatively, its plain and ordinary  
10:24 12 meaning as of 2006, not television delivered over the  
10:24 13 public Internet.

10:24 14 And the reason we pointed to 2006 is  
10:24 15 because that's when the patent was filed. And as the  
10:24 16 Court's well familiar, to the extent we need to  
10:24 17 construe a term, we look to its plain and ordinary  
10:24 18 meaning as of when the patent was filed.

10:24 19 Let's go to -- so we'll skip a couple of  
10:24 20 slides because the Court is well familiar with this.  
10:24 21 Let's go to Slide 33.

10:24 22 The term is "IPTV." And the  
10:25 23 specification uses it as something that is understood  
10:25 24 at the time, but the specification does not define  
10:25 25 IPTV.

10:25 1 And so if there's a dispute about it, we  
10:25 2 need to look outside of the specification for a  
10:25 3 definition. And, again, it's an acronym, IPTV, using  
10:25 4 from an initial cap term. So it's clearly something  
10:25 5 the specification is invoking as something new -- or  
10:25 6 something known at the time. It's not something that's  
10:25 7 being invented here.

10:25 8 Let's go to Slide 34.

10:25 9 Now, what WSOU says is the plain and  
10:25 10 ordinary meaning of IPTV service is unambiguous and  
10:25 11 easily understood on its face: Television delivered by  
10:25 12 Internet protocol.

10:25 13 But that is, in fact, not the case.  
10:25 14 Because they missed the point of what IPTV, that  
10:25 15 defined term, meant at the time of filing of the '806  
10:25 16 patent application.

10:25 17 Let's go to Slide 35.

10:25 18 And we know they missed that point  
10:26 19 because we've submitted the declaration of Leslie  
10:26 20 Simpson. His qualifications are explained in his  
10:26 21 report. It's Exhibit 1 to our opening claim  
10:26 22 construction brief.

10:26 23 It is unrebutted. There is no contrary  
10:26 24 testimony. There is no non-attorney argument rebuttal  
10:26 25 to his testimony where Mr. Simpson points out that IPTV

10:26 1 is often mistaken or mischaracterized as a service that  
10:26 2 provides videos over the public Internet. So people  
10:26 3 sometimes just say, all right, well, it's IP, it's TV.  
10:26 4 IPTV is video over the Internet.

10:26 5 But that's actually not what the  
10:26 6 understanding was of a skilled artisan at the time.

10:26 7 Let's go to Page 36.

10:26 8 And as Mr. Simpson explained, as of the  
10:26 9 filing date it was -- IPTV was understood not only in  
10:26 10 terms of the content it provided, but the type of  
10:26 11 network used to deliver that content. And he goes on.

10:26 12 Now, this testimony is unrebutted.  
10:26 13 There's no contrary expert testimony. And really what  
10:26 14 we hear and we infer we'll hear from the slides we saw  
10:26 15 this morning is that, well, you don't need to look to  
10:26 16 any of the steps because you've got a plain and  
10:27 17 ordinary meaning of the term.

10:27 18 But we've established there's a dispute  
10:27 19 as to the plain and ordinary meaning in this case. So  
10:27 20 we do need to try to construe it.

10:27 21 Let's go to Slide 37.

10:27 22 Now, we don't need to actually rely on  
10:27 23 the expert. We should, he's unrebutted. But we could  
10:27 24 just look to the extrinsic evidence as of the time of  
10:27 25 the filing of this patent. It's an Alcatel Lucent

10:27 1 patent. It's not a WSOU patent. There are no such  
10:27 2 things.

10:27 3 The assignee's president explained what  
10:27 4 IPTV was. And we have on Slide 37 an excerpt from  
10:27 5 Exhibit 2 to our opening claim construction brief: It  
10:27 6 is not TV that is broadcast over the Internet ... the  
10:27 7 "IP" refers to a method of sending information over a  
10:27 8 secured tightly managed network.

10:27 9 But we don't just need to look what the  
10:27 10 president of the original patent assignee's company  
10:27 11 said contemporaneous with filing of the patent  
10:27 12 application.

10:27 13 Let's go to Slide 38.

10:27 14 We can look to industry groups. And  
10:27 15 ATIS, as an industry, explained in July of 2005, again,  
10:28 16 contemporaneous with the preparation of and filing of  
10:28 17 the patent application.

10:28 18 Let's go to Slide 39.

10:28 19 Explain what IPTV is. So there -- and it  
10:28 20 is completely consistent with the construction we  
10:28 21 proposed, both our original construction and our  
10:28 22 alternate proposed construction, both of them.

10:28 23 And so we won't -- eager as Your Honor is  
10:28 24 as well to hear a fresh voice in this argument, we're  
10:28 25 not going to repeat everything that's on these slides.

10:28 1 The -- we'll make these points and we'll refer briefly  
10:28 2 to the other evidence.

10:28 3 Let's go to Slide 41.

10:28 4 Additional industry groups. The  
10:28 5 International Engineering Consortiums, also in 2005:  
10:28 6 IPTV is a system used to deliver digital television  
10:28 7 services to the consumers who are registered  
10:28 8 subscribers for the system ... usually in a managed  
10:28 9 network rather than public Internet to preserve the  
10:28 10 quality of service guarantees.

10:28 11 Let's go to Slide 42.

10:28 12 Same thing. What IPTV is, what IPTV is  
10:29 13 not.

10:29 14 And let's go to Slide 43.

10:29 15 So, Your Honor, our argument is very  
10:29 16 straightforward. It's a term that had a meaning at the  
10:29 17 time. We absolutely agree there was a plain and  
10:29 18 ordinary meaning at the time.

10:29 19 That meaning may have evolved over time,  
10:29 20 as the unrebutted expert explains. No rebuttal to that  
10:29 21 testimony. There's no rebuttal to the opinion that's  
10:29 22 been offered as to what the meaning of IPTV was at the  
10:29 23 time of filing. The extrinsic evidence of the meaning  
10:29 24 was unchallenged. And that extrinsic evidence should  
10:29 25 be considered by the Court. Because we do have a

10:29 1 dispute over the meaning of the term that is not  
10:29 2 argued. No one's suggesting lexicography here.

10:29 3 So that term was not defined rather in  
10:29 4 the '806 patent. We need to look to what is the  
10:29 5 evidence of the plain and ordinary meaning of that term  
10:29 6 as of the time of filing to avoid exactly the confusion  
10:29 7 that it appears WSOU intends to exploit, an evolved  
10:29 8 understanding of that meaning now 17 years -- almost  
10:30 9 17 years later.

10:30 10 So with that, Your Honor, we will rest  
10:30 11 and ask the Court to adopt either of our alternate  
10:30 12 proposed constructions. And we'll stop there.

10:30 13 THE COURT: Thank you, sir.

10:30 14 A response?

10:30 15 MR. XIE: Yes, Your Honor.

10:30 16 If I could have access to the share  
10:30 17 screen. Thank you.

10:30 18 Good morning, Your Honor. This is Moses  
10:30 19 Xie for Brazos.

10:30 20 And I will start on -- I believe it's our  
10:30 21 Slide 5.

10:30 22 Internet protocol television service, or  
10:30 23 IPTV service, is plain on its face and easily  
10:30 24 understood as television delivered by Internet  
10:30 25 protocol. This needs no construction.

10:30 1 But Google attempted to introduce two  
10:31 2 separate limitations into this easily understood term,  
10:31 3 ISP service and private, managed Internet protocol  
10:31 4 network connection. Language that appears nowhere in  
10:31 5 the claims and that is not supported by the record.

10:31 6 Your Honor's preliminary construction  
10:31 7 rejected Google's original proposal. And Google's  
10:31 8 alternate proposal simply reshuffles words around but  
10:31 9 carries the same meaning, and it should be rejected for  
10:31 10 the third time.

10:31 11 We've already litigated the issue of  
10:31 12 adding undue limitations to IPTV service during the  
10:31 13 last round of claim construction back in early 2021.

10:31 14 In that round, Google wanted the claim  
10:31 15 construed in a way that places IPTV service anywhere  
10:31 16 but on the Internet side of the ISP because that's  
10:31 17 where its products, Google TV and YouTube TV, are  
10:31 18 located.

10:31 19 To that end, Google construed access  
10:31 20 network in a way that placed the access network and, by  
10:31 21 association, also IPTV service between the subscriber  
10:32 22 and the ISP and, critically, away from the Internet.

10:32 23 That construction is shown here on the  
10:32 24 slide. Your Honor correctly rejected this restriction  
10:32 25 on IPTV service and adopted the plain and ordinary

10:32 1 meaning.

10:32 2 Today, Google is back to litigating the  
10:32 3 same issue. Although, now it's targeting IPTV service  
10:32 4 directly instead of indirectly through the access  
10:32 5 network, and now it's placing IPTV service inside of  
10:32 6 the ISP instead of between the subscriber and the ISP.

10:32 7 The result it seeks is the same, and that  
10:32 8 is to wall off IPTV service from the Internet.  
10:32 9 Specifically by saying "IPTV service is television  
10:32 10 delivered over private, managed Internet protocol  
10:32 11 network connection" -- "network connection service,"  
10:32 12 Google places IPTV service inside of the ISP and away  
10:32 13 from the Internet.

10:32 14 Your Honor got it right the previous two  
10:32 15 times, and the Court should reject Google's renewed  
10:33 16 attempt to restrict IPTV for the same reasons.

10:33 17 Google cites to various portions of the  
10:33 18 specification for its argument that the ISP always  
10:33 19 implements the access network, but each of those  
10:33 20 excerpts are clear that they're exemplary. And it's  
10:33 21 blackletter law that embodiments in the specification  
10:33 22 should not be imported into the claims.

10:33 23 In fact, in that third excerpt, it says:  
10:33 24 The electronic content source 58, another participant  
10:33 25 in system 20, represents any electronic content

10:33 1 publisher, such as a traditional portal, a video  
10:33 2 content provider, et cetera. The electronic content  
10:33 3 source is the component that provides the IPTV service.

10:33 4 And this passage says that there is no  
10:33 5 limitation on it, and so there should be no limitation  
10:33 6 on the provided IPTV service.

10:34 7 Also, to Google's reliance on the  
10:34 8 Kopykake case, that ruling was much narrower than  
10:34 9 Google makes it out to be. And it's distinguishable  
10:34 10 based on what the specification said in Kopykake.

10:34 11 And there, the issue was whether the term  
10:34 12 "screen printing" should be construed to include inkjet  
10:34 13 printing for a claim about printing on food stuff.

10:34 14 The specification in that case said that  
10:34 15 screen printing including -- included any conventional  
10:34 16 printing process or any other conventional means or  
10:34 17 methods.

10:34 18 And so because of that, the Court had to  
10:34 19 determine which processes were conventional at the time  
10:34 20 of filing. And it found that inkjet printing was not  
10:34 21 conventional. That led the Court to reject the  
10:34 22 construction that included inkjet.

10:34 23 Here, there is no disclosure in the  
10:34 24 specification that IPTV service should be limited to a  
10:34 25 conventional service and that the specification

10:34 1 actually contemplates and makes clear that IPTV service  
10:35 2 can be any service.

10:35 3 Finally, as we saw, Google points to over  
10:35 4 500 pages of extrinsic evidence, but it's not proper to  
10:35 5 consider extrinsic evidence when the disputed term can  
10:35 6 be understood from a reading of the public record.

10:35 7 IPTV service is readily understood as  
10:35 8 television delivered by internet protocol.

10:35 9 And just one last point about  
10:35 10 definitions. This Court has warned that definitions do  
10:35 11 not always carry the intended meaning of the patent and  
10:35 12 that definitions must be considered in light of the  
10:35 13 patent.

10:35 14 The intrinsic evidence here is clear that  
10:35 15 IPTV service is not limited to a service delivered over  
10:35 16 private, managed connection.

10:35 17 Google's extrinsic definitions are  
10:35 18 uncoupled from the teachings of the patent and do not  
10:35 19 convey the intended meaning of the patent. So Google's  
10:35 20 extrinsic evidence should be ignored.

10:36 21 For these reasons, the Court should  
10:36 22 maintain its preliminary constructions.

10:36 23 Thank you, Your Honor.

10:36 24 THE COURT: Thank you, sir.

10:36 25 Mr. Lanier?

10:36 1 MR. LANIER: Very briefly, Your Honor.

10:36 2 If we could get the screen back and put  
10:36 3 up Slide 43.

10:36 4 And I'll be brief, Your Honor, once we've  
10:36 5 pulled that up.

10:36 6 Thank you, Mr. Garcia.

10:36 7 Your Honor, we didn't -- what we heard  
10:36 8 was that IPTV has a meaning. We agree. It's the  
10:36 9 meaning as of 2006 that should control. And we  
10:36 10 submitted ample evidence, unrebutted evidence, that  
10:36 11 there is a confusion over that meaning that evolved  
10:36 12 over time.

10:36 13 So we respectfully submit that the  
10:36 14 extrinsic evidence, including the unrebutted expert  
10:36 15 testimony should be considered to be sure that we are  
10:37 16 considering what is otherwise undisputed the meaning of  
10:37 17 the term as understood by a skilled artisan in 2006.

10:37 18 So that's big point one. We need to look  
10:37 19 for that evidence because there's a disagreement over  
10:37 20 not whether that term had a meaning in 2006, but what  
10:37 21 it was. Big point one.

10:37 22 Big point two. We take Mr. Xie's point.  
10:37 23 And we took the Court's point about the proposed  
10:37 24 constructions. And so our alternate proposed  
10:37 25 construction eliminates the ISP requirement and

10:37 1 eliminates the subscriber requirement.

10:37 2 The key point is that this is -- the  
10:37 3 meaning of IPTV as of 2006 when the patent was filed  
10:37 4 was not just television delivered over any old public  
10:37 5 Internet access. It meant more and different than  
10:37 6 that.

10:37 7 So either way it happens, we believe it's  
10:37 8 critical for the Court to provide guidance in the form  
10:37 9 of either of those alternate proposed constructions.  
10:37 10 Or else we are going to have, at summary judgment or at  
10:37 11 trial, an expert standing up and saying, yep, you know,  
10:38 12 Google's accused products are not IPTV.

10:38 13 Well, why aren't they?

10:38 14 Well, because they're not -- they're not  
10:38 15 just -- it's just video over the public Internet. It's  
10:38 16 not over this managed system.

10:38 17 And then we're going to be back to the  
10:38 18 same issue. So we think the construction should be  
10:38 19 done now.

10:38 20 So bottom line, there's no dispute that  
10:38 21 this is a term that had a plain and ordinary meaning.  
10:38 22 No dispute that it ought to be the meaning in 2006.  
10:38 23 There is a dispute over what that meaning is. And  
10:38 24 there is un rebutted evidence as to what that meaning  
10:38 25 is.

10:38 1 So we respectfully submit that the Court  
10:38 2 should adopt one of Google's alternate proposed  
10:38 3 constructions.

10:38 4 With that, I'll stop, Your Honor. Beyond  
10:38 5 congratulating Mr. Xie for his debut and being pleased  
10:38 6 to meet him, which unfortunately we can't do in this  
10:38 7 virtual setting.

10:38 8 THE COURT: Anything else, counsel?

10:38 9 MR. XIE: Just real quick. And great to  
10:38 10 meet you too, Mr. Lanier.

10:38 11 What Mr. Simpson's expert declaration  
10:38 12 seems to show is what was conventional in 2006, but  
10:38 13 that's not the same as in what -- in Google's own  
10:39 14 words, what a POSA would have understood to mean the  
10:39 15 term at the time of filing. So something can be within  
10:39 16 the understanding of a POSA yet still not conventional  
10:39 17 or widespread.

10:39 18 And they haven't shown that a POSA  
10:39 19 couldn't understand the term "IPTV" to encompass  
10:39 20 Internet-implemented TV, only that perhaps it might not  
10:39 21 have been widespread or adopted by dictionaries or used  
10:39 22 by business people.

10:39 23 As an example, if I say "mobile  
10:39 24 communication technology," a POSA might understand that  
10:39 25 as 4G or 5G, but the POSA might also understand it as

10:39 1 6G since it's being developed and going to be rolled  
10:39 2 out. But a dictionary definition might only say 4G and  
10:39 3 5G.

10:39 4 The same is true here. IPTV should not  
10:39 5 be limited to what was in dictionaries and talked about  
10:39 6 on a broader level when it has not been shown that a  
10:39 7 POSA could not understand IPTV to mean Internet  
10:39 8 implemented and when the patentee made clear that IPTV  
10:40 9 was not limited in any way.

10:40 10 And also just to quickly address their  
10:40 11 Slide 41, a definition from the International  
10:40 12 Engineering Consortium, they use the word "usually."  
10:40 13 It's usually delivered over a private, managed network.  
10:40 14 But there could be other ways that was within the  
10:40 15 understanding of a POSA.

10:40 16 And with that, I'll pass my time, Your  
10:40 17 Honor.

10:40 18 THE COURT: Thank you, sir.

10:40 19 Mr. Lanier?

10:40 20 MR. LANIER: One sentence, Your Honor.  
10:40 21 It's not just any POSA. It's a POSA in 2006.

10:40 22 With that, we rest.

10:40 23 THE COURT: I don't know -- I don't know  
10:40 24 that I heard counsel for plaintiff address that. I  
10:40 25 think he implied it, but I think you're correct,

10:41 1 Mr. Lanier. But I took plaintiff's argument that he  
10:41 2 understood that with his last arguments.

10:41 3 But if plaintiff's counsel wants to argue  
10:41 4 anything else, I'm happy to hear it.

10:41 5 MR. XIE: None needed, Your Honor. Thank  
10:41 6 you.

10:41 7 THE COURT: Okay. I'll be back in a  
10:41 8 second.

10:41 9 (Pause in proceedings.)

10:42 10 THE COURT: I want to thank all counsel  
10:42 11 as usual for their usual exceptional work and  
10:42 12 arguments.

10:42 13 I'm going to maintain the preliminary  
10:42 14 construction of plain and ordinary meaning.

10:42 15 My understanding is that was the only  
10:42 16 claim term we had to take up. Is there anything else  
10:42 17 that we needed to take up -- Mr. Lanier, you're in my  
10:42 18 screen -- from Google's perspective?

10:42 19 MR. LANIER: No, Your Honor. Nothing  
10:42 20 more from us. Thank you for the time today.

10:43 21 THE COURT: You bet.

10:43 22 And for plaintiff?

10:43 23 MR. XIE: Correct. Nothing further for  
10:43 24 Brazos.

10:43 25 THE COURT: And I won't let it go

10:43 1 unnoticed that I have that Martin guitar, the OM-18.  
10:43 2 It's a great one. So good -- whoever made you pick  
10:43 3 that one, that's one of my favorites, so...

10:43 4 MR. LANIER: It's right over there.

10:43 5 THE COURT: It's not quite Friday, but  
10:43 6 I'll tell you have a wonderful weekend anyway. Take  
10:43 7 care.

10:43 8 (Hearing adjourned.)

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1 UNITED STATES DISTRICT COURT )  
2 WESTERN DISTRICT OF TEXAS )  
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5 I, Kristie M. Davis, Official Court  
6 Reporter for the United States District Court, Western  
7 District of Texas, do certify that the foregoing is a  
8 correct transcript from the record of proceedings in  
9 the above-entitled matter.

10 I certify that the transcript fees and  
11 format comply with those prescribed by the Court and  
12 Judicial Conference of the United States.

13 Certified to by me this 17th day of  
14 February 2023.

15  
16 /s/ Kristie M. Davis  
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10:43